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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN PARVIZ KARIMI,

Defendant and Appellant.

D074720

(Super. Ct. No. FSB1502400)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Gregory S. Tavill, Judge. Affirmed.

Benjamin B. Kington, under appointment by the Court of Appeal, for Defendant
and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Scott C.
Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Martin Parviz Karimi guilty of one count of forcible rape (Pen. Code, § 261, subd. (a)(2).)¹ The trial court sentenced Karimi to a term of eight years in prison.

Karimi's sole contention on appeal is that the judgment should be reversed because the trial court failed to adequately investigate whether prejudicial juror bias arose due to an interaction that the jury had with a defense trial witness (Karimi's mother) while waiting in the courtroom hallway during a break in the proceedings. We conclude that Karimi's contention lacks merit, and accordingly we affirm the judgment.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Karimi met a woman, R., on Facebook. Karimi and R. communicated through text messages and then agreed to meet at Karimi's house, which he shared with his mother. R. told Karimi in a text message that there would be "no trying to get in my pants," and they would be "just hanging out, just getting to know each other."

When R. arrived at Karimi's house, she greeted his mother and then went with Karimi to his bedroom. There, they talked for a while and then began an extended period of kissing. According to R., Karimi twice put his hands down her pants and digitally penetrated her vagina while they were kissing, but she told him to stop both times. R. testified that when she got up to leave after the second unwelcome touching of her vagina, Karimi told her "You're not going nowhere" and pushed her down on the bed.

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

Karimi held down R. so she could not get up, pulled off her pants, and then engaged in sexual intercourse with her while she was crying and telling him to stop.

R. left the house as soon as she was able and immediately reported the rape to a friend and to the police. Police arrested Karimi that night and questioned him at the police station, where he admitted to having sexual intercourse with R., and admitted that R. had repeatedly said "no." However, Karimi stated that he did not think R. really meant "no" because it was not a "vehement[] 'no,' " and there was no "fighting back."

Karimi was charged with two counts of sexual penetration with a foreign object by force (§ 289, subd. (a)(1)(A)) based on the two instances of digital penetration (counts 1 and 2), and one count of forcible rape (§ 261, subd. (a)(2); count 3).

At trial, Karimi testified that R. did not say "no" during the sexual intercourse, and only said "no" earlier when he touched her crotch over her clothes. At no point did Karimi think that R. did not want to have sex with him. Karimi's mother also testified for the defense. According to Karimi's mother, she was home during the incident and she heard only laughing coming from Karimi's room. When R. left the house, R. seemed to have the same demeanor as when she arrived.

At a break in the proceedings after the prosecutor's closing argument, it came to the attention of the trial court that Karimi's mother had spoken to the jurors as they sat in the courthouse hallway. In response, the trial court held a hearing outside the presence of the jury to gather information about the incident, at which two witnesses testified. First, Deputy Sheriff Ian Golditch testified that as he was walking down the hallway to obtain search warrant paperwork, he saw a woman in the hallway speaking to jurors who were

wearing juror badges. According to Deputy Golditch, the woman was "saying something about her son, and the jurors were telling her, 'Ma'am, you're not supposed to be talking to us. We can't talk to you.' " Deputy Golditch saw approximately 30 to 45 seconds of the interaction, and he exited the hallway before the interaction was over. Next, the trial court called Karimi's mother to the stand to admonish her against speaking to the jurors and to gather information about what she said to them. Karimi's mother testified that she was talking to the jurors because "I felt very bad about all the lies that I was hearing." As Karimi's mother explained, "I said that that was a lie, that none of that had happened in this case. I'm not blind. I was checking." She said, "I told them that this was a lie, none of this had ever happened, because it didn't happen." According to Karimi's mother, "None [of the jurors] answered me. They just told me 'we cannot talk to you.' "

Without asking counsel on the record whether they had any comment or argument after hearing the witness testimony, the trial court then called in the jury and admonished them about the incident as follows: "Ladies and Gentlemen, it came to the Court's attention that [Karimi's mother] may have tried to talk to one or more of the jurors out in the hallway. Obviously, she was a witness in our case, and what she said on the witness stand is evidence, but anything she said out in the hallway [is not] evidence. You are ordered to disregard it, ignore it, not hold it against any party. It is not evidence. You cannot consider it for any purpose." The trial court then stated, "Is there anybody that feels that they cannot follow the Court's order to ignore what she may have said in the hallway? Anybody? All right. I see no hands." The trial court then immediately

proceeded with the remainder of the trial, directing defense counsel to give his closing argument.

After deliberating, the jury found Karimi guilty of forcible rape in count 3, but not guilty of sexual penetration with a foreign object by force in count 1. The jury could not reach a verdict on the charge of sexual penetration with a foreign object by force in count 2, and the trial court declared a mistrial on that count, which the People then dismissed.

Prior to sentencing, Karimi filed a motion for a new trial, which was based in part on the argument that defense counsel had been ineffective for failing to make a motion for a mistrial based on the interaction that Karimi's mother had with the jurors. In denying the motion for a new trial, the trial court stated that "there was no prejudice to the defendant regarding pursuing anything further as to the defendant's mother's improper behavior." The trial court also stated that had defense counsel moved for a mistrial, that motion "would not have been granted under the circumstances."

The trial court sentenced Karimi to an upper term sentence of eight years in prison.

II.

DISCUSSION

Karimi contends that the judgment should be reversed because the trial court conducted an inadequate investigation into whether prejudicial juror bias arose from his mother's interaction with the jurors in the hallway.

A. *Applicable Legal Standards*

"An accused has a constitutional right to a trial by an impartial jury. . . . An impartial jury is one in which no member has been improperly influenced . . . and every member is 'capable and willing to decide the case solely on the evidence before it.' " (In re Hamilton (1999) 20 Cal.4th 273, 293-294 (Hamilton), citations omitted.)

" ' "Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors . . . , it is settled that a conviction cannot stand if even a single juror has been improperly influenced." ' " (People v. Nesler (1997) 16 Cal.4th 561, 578 (Nesler).)

"A sitting juror's involuntary exposure to events outside the trial evidence, even if not 'misconduct' in the pejorative sense" may cause prejudice to the defendant due to juror bias. (Hamilton, supra, 20 Cal.4th at pp. 294-295.) "Such situations may include attempts by nonjurors to tamper with the jury, as by bribery or intimidation." (Id. at p. 295.) "Juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias." (Nesler, supra, 16 Cal.4th at p. 578; see also Hamilton, at p. 295 ["a nonjuror's tampering contact or communication with a sitting juror, usually raises a rebuttable 'presumption' of prejudice"].)

When faced with evidence of possible juror bias during trial, a court should "hold[] a prompt hearing to explore the circumstances of the threat and the possibility of bias, which is the required procedure for handling a presumptively prejudicial incident of juror tampering." . . . 'A trial may proceed if the court, after considering factors such as

the communication's nature, the jurors' responses, and the curative ability of instructions . . . , finds that the jury can (and will) remain impartial and render a verdict based solely on the evidence, not the improper contact.' " (*People v. Harris* (2008) 43 Cal.4th 1269, 1304 (*Harris*).) "[A]n inquiry sufficient to determine the facts is required whenever the court is put on notice that good cause to discharge a juror may exist." (*People v. Burgener* (1986) 41 Cal.3d 505, 519.) " '[I]t is the court's duty to make whatever inquiry is reasonably necessary.' " (*Id.* at p. 518.) In cases where good cause exists for the trial court to believe that juror misconduct may have occurred, "[f]ailure to conduct a hearing sufficient to determine whether [juror misconduct] exists is an abuse of discretion subject to appellate review." (*People v. Adcox* (1988) 47 Cal.3d 207, 253.)

Assuming a proper inquiry has been made by the trial court, "whether an individual verdict must be overturned for jury misconduct or irregularity ' " 'is resolved by reference to the substantial likelihood test, an objective standard.' " ' . . . Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant." (*Hamilton, supra*, 20 Cal.4th at p. 296, citations omitted.) "[W]hen misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial." (*In re Carpenter* (1995) 9 Cal.4th 634, 653.) From receipt of extraneous information, juror bias "can appear in two different ways. First, we will find

bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. . . . Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant." (*Ibid.*, citation omitted.) "We independently determine whether there was such a reasonable probability of prejudice." (*Harris, supra*, 43 Cal.4th at pp. 1303-1304.)

B. *The Trial Court Did Not Abuse Its Discretion in Conducting the Investigation of Possible Juror Bias*

Karimi contends that the trial court abused its discretion in investigating the possible juror bias caused by his mother's interaction with the jurors in two respects. Specifically, he contends that the trial court failed to (1) adequately establish the underlying facts, and (2) conduct an adequate inquiry of the jurors as to what effect the interaction had on their ability to be fair and impartial.²

1. *Investigation of the Underlying Facts*

First, Karimi contends that the trial court did not adequately establish the underlying facts because it did not fully explore what Karimi's mother said to the jurors. According to Karimi, because Deputy Golditch stated that he saw Karimi's mother interact with the jurors for 30 to 45 seconds and the interaction was still occurring when he exited the hallway, Karimi's mother must have said something *more* than what she

² The People contend that Karimi has forfeited his challenge to the adequacy of the trial court's investigation into possible juror bias because defense counsel made no objection on that issue at trial. To forestall any claim for ineffective assistance of counsel, we will not resolve the forfeiture issue, and instead we will exercise our discretion to reach the merits of Karimi's appellate argument

described during her testimony.³ However, Karimi does not specifically identify what he believes the trial court should have done to further develop the facts, or how that would have been possible. Any assertion that Karimi's mother said something more is entirely speculative. The trial court specifically questioned Karimi's mother about whether she said anything else to the jurors. She stated, "That was all I said, I believe." We conclude that, under the circumstances, the trial court did not abuse its discretion in conducting the inquiry into the underlying facts of the interaction between Karimi's mother and the jurors. The trial court adequately explored the issue by questioning Karimi's mother about what she said and then asking whether she said anything else. The trial court also left open the possibility of further exploring the issue by giving defense counsel an opportunity to ask further questions of Karimi's mother, but he declined.

2. Inquiry of the Jurors Regarding Bias

Next, Karimi contends that the trial court inadequately questioned the jurors about whether they could be fair and impartial despite their interaction with Karimi's mother. According to Karimi, the trial court's approach of (1) instructing the jurors that they were not, for any purpose, to consider anything said by Karimi's mother to them unless it was during her testimony, and (2) inquiring whether the jurors could follow that instruction, was "wholly inadequate to discern whether the interaction would alter the jurors' view of

³ Karimi's argument on the timing issue overlooks the fact that the interaction between Karimi's mother and the jury involved both her statements to the jurors *and* the jurors' attempts to convince her that she should not be talking to them. It is reasonable that such an interaction involving a group of people would have taken at least 30 to 45 seconds.

Karimi's mother's testimony or any other aspect of the case." Karimi argues that, accordingly, the trial court's questioning of the jurors "was inadequate to rebut the presumption of prejudice." As we will explain, we reject the argument.

The issue before the trial court was whether there was "no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant." (*Hamilton, supra*, 20 Cal.4th at p. 296, italics omitted.) A trial court may consider factors " 'such as the communication's nature, the jurors' responses, and the curative ability of instructions' " to determine whether the jury " 'can (and will) remain impartial and render a verdict based solely on the evidence, not the improper contact.' " (*Harris, supra*, 43 Cal.4th at p. 1304.) The trial court addressed the " 'curative ability of instructions' " (*ibid.*) when it instructed the jurors to disregard the statements and confirmed that the jurors could follow that instruction. In so doing, the trial court properly relied on indications from the jurors that they would be able to disregard the improper statements. (*Ibid.* [in a case in which a juror "repeatedly and unequivocally stated that his ability to deliberate impartially would not be affected by [a] threat," the court observed that "[c]ourts may properly rely on such statements to determine whether a juror can maintain his or her impartiality after an incident raising a suspicion of prejudice"].)

Although Karimi contends that further inquiry of the jurors was necessary to determine whether they were biased, he does not explain what further inquiry should have been made or what would have been gained by further inquiry. Specifically, it was reasonable for the court to dispense with any further inquiry of the jury because it had

already determined the nature of the statements made by Karimi's mother. Those statements did not contain any information that would be expected to create bias against Karimi. Indeed, it appears that Karimi's mother was attempting to communicate information that she believed would *help* Karimi's case by stating her view that the evidence against Karimi was not true. Karimi acknowledges that "it is safe to assume she did not say anything intentionally detrimental to Karimi," and he does not explain how his mother could have *inadvertently* caused jurors to become biased against him.⁴ Although, Karimi suggests that the jurors could have developed a negative view of his mother's credibility because of her statements to them, that effect alone would not constitute bias *against Karimi*. Moreover, because the testimony of Karimi's mother was only tangentially relevant to the issue presented at trial, any damage to her credibility would not have materially prejudiced Karimi. The jurors understood that Karimi's

⁴ Karimi relies on *People v. McNeal* (1979) 90 Cal.App.3d 830, which concluded that the trial court conducted an inadequate investigation into possible juror bias after the trial court received a note from the jury indicating that one of the jurors had personal knowledge of something related to the case. (*Id.* at pp. 835, 839.) The trial court did not inquire about the nature of the juror's personal knowledge, and instead simply inquired whether she could remain fair and impartial. (*Id.* at p. 836.) *McNeal* held that "[i]t is not enough for the juror alone to evaluate the facts and conclude that they do not interfere with his or her impartiality. . . . Once the court is alerted to the possibility that a juror cannot properly perform his duty to render an impartial and unbiased verdict, it is obligated to make reasonable inquiry into the factual explanation for that possibility." (*Id.* at p. 838.) This case is not like *McNeal* because in deciding whether there was a reasonable probability of prejudicial bias in this case the trial court *did* conduct an adequate factual inquiry to determine what Karimi's mother said to the jurors. It did not rely solely on the indication from the jurors that they would be able to disregard the improper communication. Based on the totality of the evidence before it, which included an understanding of what Karimi's mother told the jury, the trial court concluded that there was not a reasonable probability of juror bias.

mother was not in the bedroom when the rape occurred. The fact that Karimi's mother heard only laughter in the bedroom and did not perceive anything wrong when R. left the house does not contradict R.'s version of events, as R. did not testify that she screamed or yelled during the rape and did not testify to any unusual behavior as she was leaving the house.

In sum, we conclude that Karimi has not established that the trial court abused its discretion in its conduct of the hearing to investigate the possible prejudicial effect of Karimi's mother's interaction with jurors. The trial court's investigation was reasonable based on the circumstances. The investigation provided the trial court with a sufficient basis to conclude, as it did, that it was not reasonably probable that the jurors had become prejudicially biased against Karimi.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

DATO, J.